Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

ISMAEL BARRON AND MARIA MERAS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether guidance is needed from this court on what constitutes a trial attorney's "tactical decision" in an ineffective assistance of counsel claim.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Ismael Barron and Maria Meras, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on September 24, 1997.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals affirmed Petitioners convictions and was not published. A copy of the Memorandum Opinion is attached as APPENDIX A.

JURISDICTION

On September 24, 1997, the Court of Appeals entered its opinion affirming the conviction of petitioners for violations of 21 U.S.C. §§ 846 and 841(b)(1)(A) (conspiracy to distribute heroin and cocaine) and 21 U.S.C. §§ 841(a) and (b)(1)(B-C) (possession and distribution of heroin and cocaine) in case 96-36270 [APPENDIX A]. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty or property without due process of law;. . . .

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to . . . the assistance of counsel for his defense.

STATEMENT OF THE CASE

Petitioners were charged in an Indictment alleging a conspiracy to distribute heroin and cocaine; substantive offenses in furtherance of the conspiracy, including possession and distribution of heroin and cocaine; and the unlawful use of communication facilities, *inter alia*, Petitioners were convicted of twenty-three Counts in the Second Superseding Indictment ("Indictment"), including Count One (conspiracy) and Counts Six and Forty-eight (substantive offenses alleged to be overt acts in furtherance of the conspiracy), *inter alia*.

The issue at trial was whether Petitioners were part of a single conspiracy as alleged in Count One of the Indictment. At trial, the court instructed, *inter alia*, that a person could become a member of a conspiracy "even though the person does not have full knowledge of the conspiracy, and did not directly conspire with other defendants or other conspirators in the overall scheme." Despite knowledge of these instructions, trial counsel for Petitioner Barron conceded in closing argument Barron's guilt of key substantive offenses.

Trial counsel's apparent strategy in defending Barron was to establish the existence of multiple conspiracies rather than the single one alleged. Before Barron's trial

counsel delivered his closing argument he was aware that the court would instruct the jury, *inter alia* that a person could become a member of a conspiracy "even though the person does not have full knowledge of the conspiracy," and "did not directly conspire with the other defendants or other conspirators in the overall scheme." Despite these instructions, Barron's trial counsel conceded in closing argument guilt of Counts Six and Forty-eight. Counts Six and Forty-eight were at the heart of the conspiracy alleged in Count One.

Following the concessions by Barron's counsel in closing argument, Petitioner Meras' counsel restated the concessions of guilt made by Barron's counsel and, although denying that Petitioners participated in those same sales, argued that she "was dependant on [Barron];" "went with [him] wherever he went," and that was on trial "because of her relationship to [him]." The combined effect of the jury instructions, the concessions of guilt by Barron's counsel and the acknowledgment by Petitioner Meras' counsel of her close association with Barron, was to deny Petitioners their due process and a fair trial rights.

Nevertheless, the appellate court found that Petitioners were not denied due process because the closing argument of Barron's trial counsel was the result of a "reasonable tactical decision to concede two lesser counts while vigorously contesting the counts carrying greater punishment," [Appendix A, at 2]. Citing *United States v. Swanson*, 943 F. 2d 1070, 1075-76 (9th Cir. 1991), the appellate court noted that in some cases a trial attorney may find it advantageous to his client's interests to concede

certain elements of an offense or his guilt of one or certain charges.

However, the appellate court's conclusion that the concessions by counsel were "a reasonable tactical decision" was nothing more than an assumption unsupported by the record or sound legal analysis.

REASON FOR ALLOWANCE OF THE WRIT

THIS PETITION SHOULD BE GRANTED BECAUSE GUIDANCE FROM THIS COURT IS NEEDED ON WHAT CONSTITUTES A TRIAL ATTORNEY'S "TACTICAL DECISION" IN AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

This petition should be granted because guidance is needed from this court on what constitutes a trial attorney's "tactical decision" in an ineffective assistance of counsel claim. The decision by the appellate court, that it was constitutionally permissible for Petitioner's trial counsel to adopt a strategy that effectively conceded Petitioner's guilt on the most serious counts of the Indictment, eviscerated the protections guaranteed to Petitioners by the Fifth and Sixth Amendments. This strategy prejudiced Petitioner Meras by virtue of her association with Barron. *United States v. Zafiro*, 506 U.S. 534, 113 S.Ct. 933 (1993); *United States v. Escalante*, 637 F.2d 1197, 1201 (9th Cir.) *cert. denied*, 449 U.S. 856 (1980) (A defendant may be irreparably prejudiced by the "spillover" effect of incriminating evidence against a co-defendant).

It is well established that an ineffective assistance of counsel claim is not available where trial counsel has employed a sound, but unsuccessful trial strategy, *Strickland v. Washington*, 466 U.S. 668, 689 (1984); and, that a constitutionally permissible trial strategy might sometimes include conceding guilt on certain elements of an offense or certain charges. *United States v. Swanson*, 943 F.2d 1070, 1075-76 (9th Cir. 1991). However, at some point counsel's chosen tactics cease to be unassailable strategic decisions and become ineffective assistance of counsel. This Court should grant this petition because what constitutes a "tactical decision" is not as yet clearly defined and, as in the case at bar, the defendant's trial counsel virtually assures the defendant's conviction on all counts of the Indictment. *United States v. Cronic*, 466 U.S. 648, 659-660 (1984) (If no actual "assistance" for the accused's "defense" is provided, then the constitutional guarantee has been violated).

In *Swanson*, cited by the Court of Appeals in its opinion, the defendant appealed his conviction and sentence for bank robbery because of defense counsel's concessions of guilt during closing argument. The *Swanson* court reversed the defendants' conviction and held:

> When a defense attorney concedes that there is no reasonable doubt concerning the only factual issues in dispute, the Government has not been held to its burden of persuading the jury that the defendant is guilty . . . [Trial counsel's] statements lessened the Government's burden of persuading the jury that [the defendant] was the perpetrator of the bank robbery. [Trial counsel's] conduct tainted the integrity of the trial. The Supreme Court instructed in *Cronic* that "if

> counsel entirely fails to subject the prosecution's case to a meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.

Swanson at 1074-75 (the total breakdown in the adversarial system presented an exception to the requirement that the defendant show that the outcome of the trial would have been different without counsel's errors or omissions).

In his closing argument at Petitioner's trial, Petitioner's counsel told the jury:

> *I'm not going to* stand here addressing you people of reason and common sense and *insult your intelligence by telling you* that Ismael Barron is a saint and that *Ismael Barron never dealt drugs. You know he did.* What's been said in court shows he did. *We concede that. We concede that.* And as a matter of fact ladies and gentlemen, *we concede Count 48,* Teresa Lowery, three kilos. *I'm not going to insult your intelligence.*
>
> . . .
>
> *Count 6* at Ismael's house way back in November of '89, *he certainly aided and abetted. There's no question about that.* But that's all we're going to concede. No mas. No mas.
>
> . . .
>
> You've heard some evidence via phone calls of Mr. Barron supposedly getting together with Uriel at Denny's restaurant so that *a tire could be passed. Now, look! We know what a tire means, Okay? So I'm not going to insult you there.*

Barron's trial counsel *knew* when he made these arguments that the trial court would instruct the jury that one could become a member of the conspiracy "even though the person does not have full knowledge of the conspiracy." He also knew that the jury would be instructed, based on *Pinkerton v. United States*, 28 U.S. 640, 646-47 (1947), that a defendant may agree to participate in a conspiracy, even if he did not conspire in "the overall scheme" if:

> (1) the defendant directly conspired with one or more conspirators to carry out at least one of the objects of the conspiracy, (2) the defendant knew or had reason to know that other conspirators were involved with whom the defendant directly conspired, and (3) the defendant had reason to believe that whatever benefits the defendant might get from the conspiracy were probably dependent upon the success of the entire venture.

Based on these instructions, the concessions of guilt made by Barron's trial counsel virtually assured the convictions of Petitioners not only on Counts Six and Forty-eight, but also on Count One. *See United States v. Bibbero*, 749 F.2d 581, 587 (9th Cir. 1984) (Once the existence of a single conspiracy is established, even a slight connection, is sufficient to find that a defendant was part of the conspiracy.)

CONCLUSION

For the foregoing reasons, petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully Submitted,

Dated: 12-23-97

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APPENDIX "A"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ISMAEL BARRON, Defendant-Appellant.	No. 96-36270 D.C. Nos. CV-96-00625-BJR CR-90-00323-BJR
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARIA MERAS, Defendant-Appellant.	No. 96-36309 D.C. Nos. CV-96-00659-BJR CR-90-00323-BJR MEMORANDUM* (Filed Sept. 24, 1997)

Appeal from the United States District Court
for the Western District of Washington
Barbara J. Rothstein, District Judge, Presiding

Submitted September 22, 1997**

Before: HALL, BRUNETTI, and THOMAS, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Federal prisoners Ismael Barron and Maria Meras appeal the district court's orders denying their 28 U.S.C. § 2255 motions to vacate their narcotics convictions on the ground of ineffective ~~assis~~stance of counsel. We review de novo a district court's decision on a section 2255 motion. *See Sanchez v. United States*, 50 F.3d 1448, 1451-52 (9th Cir. 195). We have jurisdiction pursuant to 28 U.S.C. § 2255, and we affirm.

—

Barron (No. 96-36270)

Barron contends that his trial counsel was ineffective for conceding in closing argument that Barron was guilty of dealing drugs as alleged in Counts 6 and 48 because those were the overt acts used to show his guilt in the Count 1 conspiracy count. He also contends that this admission violated his due process right to a fair trial. These contentions lacks [sic] merit.

We review de novo a district court's determination that trial counsel rendered effective assistance. *See United States v. Span*, 75 F.3d 1383, 1387 (9th Cir. 1996). To prevail on a claim of ineffective assistance, a defendant must show both that his counsel's performance was deficient and that this prejudiced his case. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984).

During closing argument, Barron's defense attorney conceded that Barron had dealt drugs as alleged in count 6 and count 48. Counsel contested the remaining counts charged in the 32-count indictment and contested the allegations that Barron was a part of a single over-arching conspiracy. In so doing, counsel was making a reasonable

tactical decision to concede two lesser counts while vigorously contesting the counts carrying greater punishment. *See United States v. Swanson*, 943 F.2d 1070, 1075-76 (9th Cir. 1991) (noting that "in some cases a trial attorney may find it advantageous to his client's interests to concede certain elements of an offense or his guilt of one of certain charges")[1]; *see also Strickland*, 466 U.S. at 689 ("the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy").

Nor did counsel's concessions prejudice Barron. Count 6 involved a hand-to-hand delivery of one kilogram of cocaine by Barron and his common-law-wife Maria Meras, to a Drug Enforcement Agency agent, acting undercover. Count 48 involved a second hand-to-hand delivery by Barron and Meras of three kilograms of cocaine to the same agent; Barron and Meras were arrested directly after that transaction. The DEA agent testified at trial and her testimony regarding the transactions remained uncontroverted. In addition, numerous recorded conversations between Barron and Meras were played at trial indicating they were kilogram distributors of cocaine and heroin. Accordingly, defense counsel's concession that Barron had dealt drugs, did not prejudice Barron. *See Strickland*, 466 U.S. at 689. The district court's

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[1] Relying on *Swanson*, Barron argues that his counsel's errors were so egregious that this court should presume prejudice. *See Swanson*, 943 F.2d at 1074 (*citing United States v. Cronic*, 466 U.S. 648 (1984). However, in *Swanson* the defense attorney told the jurors "that no reasonable doubt existed as to his client's identity as the perpetrator of *the only crime charged in the indictment*" *Id.* at 1076-77 (emphasis added).

order rejecting Barron's claims that his due process rights were violated and counsel was ineffective is therefore

AFFIRMED.

Meras (No. 96-36270)

Meras contends that she was denied due process and a fair trial because the closing concessions made by Barron's defense counsel resulted in prejudice to her because (1) they were repeated, rather than cured, by her own defense attorney and (2) her attorney commented on her close link to Barron, her common-law-husband. We reject her contentions for the same reasons we rejected Barron's contentions regarding his counsel's concessions on count 6 and 48. The district court's order rejecting Meras' contention that she was denied due process is therefore

AFFIRMED.